Filed 1/14/09 In re K.C. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. K.C., Defendant and Appellant.	A120899 (Alameda County Super. Ct. No. SJ08008889-01)

Appellant was declared a ward of the court after he and other family members stole liquor from a supermarket. When a security guard from the store attempted to stop the theft, appellant's cousin pointed a gun at the guard, and the group left in a waiting car. While the juvenile court found the evidence insufficient to support the allegation of burglary, it concluded that appellant had committed robbery. Appellant contends the evidence was also insufficient to support a finding that he committed robbery and that the juvenile court abused its discretion in imposing a gang condition. Although we modify the gang condition, we otherwise affirm.

I. BACKGROUND

Appellant was the subject of a juvenile wardship petition filed January 22, 2008, pursuant to Welfare and Institutions Code section 602, subdivision (a). The petition alleged that he had committed robbery (Pen. Code, § 211) and burglary (Pen. Code,

§ 459). It was also alleged that appellant was armed with a firearm in the commission of the robbery. (Pen. Code, § 12022, subd. (a)(1).)

At the contested jurisdictional hearing, held February 13 and 15, 2008, a security guard, Matthew Pullen, who was working at a Safeway store in Union City on the night of January 17, 2008, testified that he noticed appellant walk into the store, look around for a short time, and then gesture to people outside the store to come inside. Finding the conduct suspicious, Pullen conferred with the other guard on duty, Jesse Perez, and walked upstairs to watch appellant on the security video monitors. The monitor trained on the liquor aisle showed a woman, later identified as appellant's sister, Kay., holding two big bottles of brandy walking out of the aisle. At the same time, appellant was walking back and forth in front of the aisle, along with a person later identified as his cousin D. Pullen watched Kay. walk in the direction of the door of the store, bypassing the cash registers. He notified Perez by cell phone to watch for the group.

After his original conversation with Pullen about appellant, Perez had gone outside the store to see if anyone was waiting. As he was leaving, he noticed that D. and Kay. had just entered. Perez saw a car stopped at the fire lane curb outside, with a woman waiting in the driver's seat. Suspicious, he moved to photograph the license plate of the car. Before he was able to take the picture, D. and Kay. ran out of the store. Kay. was carrying two large bottles of brandy. Perez walked over, identified himself to Kay., grabbed both of her arms, and told her she had to return with him to the store. At the time, D. and appellant were standing near each other by the door of the store. As Perez escorted Kay. back toward the store, D. approached and told Perez to let go of his cousin. Perez responded that she needed to "come upstairs, cooperate, and she'll go home." D. then told Perez that he would shoot him if he did not let go of Kay., pulled a gun from under his clothing, and pointed it at Perez. At the time, appellant was standing on the other side of Perez, looking directly at him. Frightened, Perez released Kay.

D., whose jurisdictional hearing was conducted jointly with appellant's, testified that appellant and the two women involved were his cousins. The four of them drove to Safeway that day in appellant's father's car. On the way, D. found a toy gun in the back

seat that he had left in the car on a prior visit. He confirmed the security guard's general description of the group's behavior, but he claimed he went into the store with the intent to buy a soda. He explained that he did not see Kay. take the brandy and simply followed her out as she left the store. When Perez, who was not dressed in a uniform, grabbed Kay., D. became alarmed, grabbed the toy gun from the car, put it under his shirt, then pulled it out and threatened Perez. After Perez released Kay., the group got into the car, and, as they drove from the store, D. threw away the gun.

The court refused to sustain the allegation of burglary, but it found true the allegation of robbery against appellant, ruling: "I think that what you have here is probably exactly what [the prosecutor] said, which is that these folks decided that they were going to go steal some liquor and did it together and thought about it, but I really don't see any proof that that was done. It's circumstantial but not enough to convince me beyond a reasonable doubt that that's what happened, so I'm not going to make any finding on the burglary. [¶] As to the other part of this, once the young woman or girl . . . takes the booze, it's pretty clear that both of these guys know that she's taking the booze. She has it with her going out to the car. I don't believe for a second that they didn't know she was stealing it. I also don't believe for a second that they didn't know that this fellow was a security guard of some kind from Safeway that's coming up to her and bringing her back in. . . . So at that point, the confrontation does become a [robbery], and the finding will be that they both are involved in that [robbery]." The juvenile court, however, found in favor of appellant and D. on the arming allegation.

Appellant was found to be a ward of the court and placed on home supervision. In addition to other standard conditions of probation, the court imposed gang-related conditions.

II. DISCUSSION

Appellant contends that, in light of the trial court's failure to find the burglary allegations true, the evidence was insufficient to support the finding either that he participated in or aided and abetted a robbery. We review "the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the

conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt." (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.)

The Attorney General argues that appellant was an aider and abettor of the robbery because he was part of a preplanned scheme to take the brandy in which each of the four individuals had a predetermined role. While we recognize that the evidence strongly supports such a conclusion, the juvenile court expressly found that there was insufficient evidence to support the conclusion that the group was engaged in a preplanned activity. The ruling of the juvenile court precludes us from affirming on this basis.

There is, however, substantial evidence to support a finding that defendant was criminally liable for the robbery under the "natural and probable consequences" doctrine. "It sometimes happens that an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime (the nontarget offense)." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) "[A]n aider and abettor 'is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.' . . . [A]lthough variations in phrasing are found in decisions addressing the doctrine—'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable'—the ultimate factual question is one of foreseeability. [Citations.] 'A natural and probable consequence is a foreseeable consequence' [citation]; the concepts are equivalent in both legal and common usage." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106–107.)

Despite its conclusion defendant was not part of a burglary, the juvenile court had no trouble finding that appellant had aided and abetted a theft, which is the unlawful taking of property of another. (*People v. Avery* (2002) 27 Cal.4th 49, 54.) As the court noted, "As to the other part of this, once the young woman or girl . . . takes the booze, it's pretty clear that both of these guys know that she's taking the booze. She has it with her going out to the car. I don't believe for a second that they didn't know she was stealing

it."[1] The evidence supports this conclusion. Pullen described D. and appellant as pacing at the head of the liquor aisle, apparently keeping watch, while Kay. took the brandy. They then escorted her from the liquor aisle straight out the doors of the store, without going through the checkout line, while she was carrying the brandy in plain sight. Accordingly, there is substantial evidence that appellant, acting with knowledge that Kay. intended to steal the brandy, encouraged and facilitated her theft.

Once appellant decided to join Kay. and D. by aiding and abetting the theft, he became criminally liable, under the "natural and probable consequences" doctrine, for any other reasonably foreseeable crime they committed during the course of it. There is substantial evidence that robbery was a reasonably foreseeable consequence of the theft. It is commonly known that stores like Safeway maintain elaborate systems to prevent theft, including the hiring of security guards and the operation of security cameras. Indeed, appellant was apparently checking for guards or other watchful employees before signaling D. and Kay. to enter the store. Under those circumstances, it was reasonably foreseeable, despite appellant's precautions, that the security system would detect the theft and an attempt would be made to stop it. Further, it was reasonably foreseeable that, should a security guard or other store employee confront D. or Kay. to stop the theft, one or the other would use force or fear to get away and retain the brandy. Regardless of whether appellant knew D. was carrying a weapon, the use of some type of force or intimidation was readily foreseeable. As a result, there is substantial evidence to support the juvenile court's decision to sustain the allegation of robbery.

Appellant also challenges the imposition of the probation condition requiring him to refrain from wearing or displaying gang-related paraphernalia and having contact with

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[1] Although the crime of theft was not alleged against appellant, a conviction on the "target" offense is not necessary to sustain a conviction for the more serious crime under the natural and probable consequences doctrine. (Cf., *People v. Prieto* (2003) 30 Cal.4th 226, 252 [jury must be instructed regarding the elements of the target offense but is not required to convict on that offense].) As discussed, the juvenile court made an express factual finding that a theft had occurred and that appellant had been a participant in the theft.

gang members.[2] The juvenile court imposed this condition because it found that D., appellant's cousin who used the gun, is a gang member. In addition, the probation report noted that "[appellant] does not belong to a gang but reported he has family members and friends who belong to the Norteno Gang."

"When a court grants probation, it has broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citation.] 'The trial court's discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute.' [Citation.] Probation conditions that regulate conduct 'not itself criminal' must be 'reasonably related to the crime of which the defendant was convicted or to future criminality.' [Citation.] 'As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or " ' "exceeds the bounds of reason, all of the circumstances being considered." ' " [Citation.] [¶] In imposing probation conditions, the juvenile court's power is even broader than that of a criminal court. [Citation.] Welfare and Institutions Code sections 727 and 730 authorize 'the juvenile court [to] impose and require "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." ' " (*In re James C.* (2008) 165 Cal.App.4th 1198, 1203.)

If there were some evidence in the record to support the trial court's finding that D. is a gang member, there would be little question that the juvenile court acted within its discretion in imposing the gang condition. There is no such evidence. According to the Attorney General's opposition brief, the court's conclusion was based on D.'s admission during his dispositional hearing, which had been conducted earlier. The transcript for

[2] The condition reads: "Do not wear, display, use, possess, write, paint or draw by any means any insignia, emblem, button, badge, cap, hat, scarf, bandana or any object or article of clothing which is evidence of affiliation, association or membership in any street gang . . . nor associate with anyone who does."

this hearing is not in the appellate record, however, and the Attorney General's statement in his brief is not itself evidence.[3]

Although we are precluded from relying on D.'s purported admission, we nonetheless conclude that there is sufficient support in the record for the juvenile court's imposition of the condition. Appellant told the probation department that he has both family members and friends who are gang members, suggesting that he is surrounded by gang culture. Given these multiple relationships between appellant and gang members, the juvenile court would have been within its discretion in concluding that appellant was acting in a manner influenced by gang conduct when he participated in the robbery, regardless of whether the other participants actually were gang members. The condition was therefore both connected to the crime and, more importantly, to future criminality.

Although we find the gang condition to have been reasonable, we agree with appellant that, as written, the condition is vague and overbroad for the reasons discussed in *In re Vincent G.* (2008) 162 Cal.App.4th 238. We therefore modify the condition in a manner consistent with the modification imposed in *Vincent G.* (*Id.* at pp. 247–248.)

III. DISPOSITION

The gang condition is modified as follows: "Do not wear, display, use, possess, write, paint, or draw by any means any insignia, emblem, button, badge, cap, hat, scarf, bandana or any object or article of clothing that you know, or that a probation officer informs you, is evidence of affiliation, association or membership in any street gang, nor associate with anyone who, to your knowledge or information, does. For purposes of these conditions, the word gang means a criminal street gang as defined in Penal Code section 186.22, subdivisions (e) and (f)."

As so modified, the judgment is affirmed.

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[3] The Attorney General argues that we can take judicial notice of the hearing. Even assuming that is true, the Attorney General has not included the hearing transcript of which he seeks notice in the appellate record. No matter how trustworthy it may be, the assurance of the Attorney General that the evidence exists is insufficient for us to take judicial notice of an item that is neither common knowledge nor in the appellate record.

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Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Flinn, J.[*]

[*] Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.